No. 12281

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MRS. LEE BROOKS, also known as Mrs. Gwenlyn Brooks,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellee.

APPELLANT'S BRIEF.

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TOPICAL INDEX

PAGE

Basis of jurisdiction 1

Statement of the case 2

Point I. The District Court had no jurisdiction of this equitable case, when filed, because at that time there was, and still is, pending in the California state court, another action by the tenant White for damages for overcharges (which is the main subject matter of this action) 8

Point II. Objection to lack of jurisdiction is not waived by failure to include such defense in the answer 10

Point III. The court had no jurisdiction to grant the expediter any relief because the 1942, 1947 and 1948 acts all expired by their terms on or prior to April 1, 1949; and all rights to recover on overcharges expired therewith 11

Point IV. The District Court had no jurisdiction of this act filed July 23, 1948, because the 1942 act, as amended, had expired by its terms prior thereto 12

Point V. The complaint fails to state a cause of action, in that it fails to show with certainty upon which federal act it was founded 13

Point VI. This action was barred by the one-year statute of limitations 15

The law 15

The law relative to the retroactive order 20

Point VII. There was no equitable ground for this action, because both tenants had moved out of the property before this action was filed; and, therefore, no basis for the incidental relief of damages for overcharges 21

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Bell, In re, 19 Cal. 2d 488, 122 P. 2d 22	13
Creedon v. Randolph, 165 F. 2d 918	16
First National Bank & Trust Co. v. Skokie, 173 Fed. 1	9
Gillis v. Keystone Mutual Casualty Co., 172 F. 2d 826	9
Gregg v. Winchester, 173 F. 2d 512	9
Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226	9
Missouri Pacific R. Co. v. United States, 16 Fed. Supp. 752	11
Paxton v. Smock, 73 Fed. Supp. 793	22
Porter v. Warner Holding Co., 328 U. S. 395	16
Rosenberg v. Rosenberg, 85 F. 2d 349	9
S. C. v. Gaillard, 101 U. S. 433, 25 L. Ed. 937	11
Sampson v. Thomas, 76 Fed. Supp. 691	15
Talbot v. Woods, 164 Fed. Supp. 2d 493	12
Union Nat'l Bank et al. v. McDonald, 36 Fed. Supp. 46	10
Woods v. Gochnour, 81 Fed. Supp. 457	12, 16
Woods v. Kooker, 83 Fed. Supp. 362	22

Statutes

Emergency Price Control Act of 1942, Sec. 2(b)	13
Emergency Price Control Act of 1942, Sec. 4(a)	13
Emergency Price Control Act of 1942, Sec. 205	3
Emergency Price Control Act of 1942, Sec. 205(e)	16
Emergency Price Control Act of 1942 (50 U. S. C. A., App. Sec. 901	3, 16
Emergency Price Control Act of 1942, Sec. 901(b) (50 U. S. C. A., Sec. 901)	6, 11, 16
Housing and Rent Act of 1947, Sec. 206	3, 6
Housing and Rent Act of 1947, Sec. 206(a)	13
Procedural Regulations 3, Document No. 59148, Sec. 1300.207	20
Procedural Regulations 3, Document No. 59148, Sec. 1300.362	20
Rules of Civil Procedure for District Courts, Rule 12(b) (28 U. S. C. A., following Sec. 723(c))	10
Rules of Civil Procedure for District Courts, Rule 63(a)	2
Rules of Civil Procedure for District Courts, Rule 73(a)	2

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Appellee.

APPELLANT'S BRIEF.

Basis of Jurisdiction.

It is appellant's contention that the United States District Court did not have jurisdiction of this case as to the White claim for restitution [Count I of the Complaint, Tr. pp. 2-5 and 8], for the $797.50 of the $924.50 sued for; and the grounds for lack of the District Court's jurisdiction are as follows:

(1) The pendency of a California state court action at the time this action was filed. [See Motion to Dismiss, Tr. p. 27.]

(2) The court had no jurisdiction because both tenants had vacated and removed from the premises prior to the filing of this action, and there is no evidence in the record that the landlord rerented or was then receiving rent for the premises. [See Motion to Dismiss, par. 2, Tr. p. 27.]

The appellee attempted to set forth in the complaint facts giving the District Court jurisdiction. [See Complaint, par. II of the First Cause of Action, Tr. p. 3, and par. II of the Second Cause of Action, Tr. p. 6.] Issues were raised by the answer of the appellant. [Tr. pp. 9 and 10.]

The jurisdiction of this Court of Appeals is predicated on a part of Rule 63(a) of the Rules of Civil Procedure for District Courts, reading as follows:

> "A party may appeal from a judgment by filing with the District Court a Notice of Appeal."

The time within which to appeal is governed by Rule 73(a) of the Rules of Civil Procedure for District Courts, that is, the time "commences to run and is to be computed from the entry of . . . an order . . . denying a motion for a new trial."

The motion for a new trial and the Motion to Dismiss were denied by the District Court on March 14, 1949 [Tr. pp. 55 and 56], and the Court on such denial granted appellant thirty days to appeal.

The notice of appeal was filed April 12, 1949, within said thirty-day period. [Tr. p. 45.]

Statement of the Case.

This is an appeal from a judgment of the United States District Court entered on December 2, 1948, in favor of the plaintiff, Tighe E. Woods, Housing Expediter, against the defendant and appellant Mrs. Lee Brooks [Tr. p. 45], as landlord.

The appeal is also taken from the order denying said defendant's motion for a new trial [Tr. p. 45] made and entered March 14, 1949. [Tr. p. 55.]

The appeal is also taken from the denial by the Court of defendant's motion to dismiss this action on jurisdictional and other grounds [Tr. p. 45], which motion to dismiss and the grounds thereof appear in the Transcript, pages 26 to 28.

This action was for restitution of money claimed illegally paid through an overcharge for rental and for an injunction, and is in the form of an equitable action authorized by statute (Sec. 205(a) of the Emergency Price Control Act of 1942, as Amended, U. S. C. A. Tit. 50 Appendix, Sec. 901 *et seq.*, or Sec. 206 of the Housing and Rent Act of 1947 as Amended) to be brought by the Housing Expediter. [Tr. pp. 2-6.]

At the time of the commencement of this action on July 23, 1948 [Tr. p. 8], there was still pending in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, an action for treble damages filed by one tenant, Mrs. Harold White, against the defendant and appellant hereunder for treble damages for the same overpayment of rentals as was the subject matter of the restitution alleged in the complaint herein. (See the complaint in the file in the State Municipal Court action, transmitted to this Court for inspection under paragraph 19 of the designation of the parts of the record on which appellant relies. [Tr. p. 56.] That was a legal action under Section 205 of the Emergency Price Control Act of 1942, as amended, and the Act of 1947 (see said complaint in said state file).)

Proof of the pendency of said state action on July 23, 1948, is shown in this record by the Minute Orders in said Municipal Court action, certified copies of which were filed with the Motion to Dismiss this action. [Tr. pp. 28, 29, 30 and 31.] That record shows that the treble dam-

ages action was brought on for trial in the state court and during the course of the trial counsel for plaintiff (the tenant) moved to dismiss, which motion was granted on September 12, 1947; and on the following day the Municipal Court Judge on his own motion, vacated and set aside said judgment, and ordered:

> "Further proceedings subject to stipulation of Counsel." [Tr. p. 29.]

As appears from the affidavit used on the Motion to Dismiss [Tr. p. 28] of Edgar G. Wenzlaff, then attorney for appellant here, no denial of which was made by counter-affidavits on said motion, said Municipal Court action was tried in Division 2 of said State Municipal Court; that the Judge in said action expressed his opinion that the judgment should be for the defendants; whereupon plaintiff there moved to dismiss, and the Court ordered such dismissal. [Tr. p. 39.]

That the next day the Municipal Court Judge, Judge Tyrell, on his own motion, vacated and set aside the order of dismissal and ordered that further proceedings should be subject to stipulation of counsel. That there never was, prior to the date of said affidavit [Feb. 9, 1949], any stipulations of counsel in that action relative to further proceedings [Tr. p. 39], and therefore said action was pending and in full force and undetermined when this action was filed in the District Court on July 23, 1948.

In this equitable action, seeking relief by way of injunction against appellant from demanding or receiving rental in excess of the maximum legal rent in violating the Acts described in the complaint, and in the first cause of action also seeking, as an incident thereto, the amount claimed as over-charges from the defendant to Mrs. Harold White, one of the tenants, in the sum of $797.50, and

from another tenant, Mrs. Mary Woodfaulk the sum of $127.00.

The answer of appellant denied receipt of over payments of rent from Mrs. Harold White or from the other tenant.

After a trial judgment went for the Housing Expediter for restitution in the amount sued for in the complaint, less a credit of $50.00 allowed by the Court; and the seventh paragraph of the judgment enjoins and restrains appellant from receiving rents in excess of the maximum rent under and pursuant to the Housing and Rent Act of 1947 and the regulations thereunder. [Tr. pp. 9, 17, 18, 19 and 20.]

The questions involved in this case and the manner in which they are raised, are briefly stated as follows:

(1) *This Court had no jurisdiction of this case for two reasons:*

(a) A California State Court action was pending at the time this action was filed. (For the facts, see the preceding statement of the case.) See Point I, this brief.

(b) No equitable basis for this Court's jurisdiction existed at the time of the filing of the action and the trial thereof, because the tenants had moved out of the premises before the action was filed [see affidavit of appellant filed with motion to dismiss, Tr. pp. 32 and 33]; and there is no evidence in this case, shown by the record, that appellant re-rented the premises to new tenants, or was receiving any rentals at the time this action in equity for injunction and restitution was filed, on July 23, 1948. (See Point VII, this brief.)

These points are presented by the Motion to Dismiss; supported by the undenied affidavit filed therewith. [Tr. pp. 26-41.]

(2) *The lack of the Court's jurisdiction was not waived by failure to include said defense in the answer.*

This point is made in paragraph III of the points on which appellant intends to rely. [Tr. p. 50.] See Point III of this brief.

(3) *As this action was pending when the 1947-1948 Housing and Rent Acts expired on March 31, 1949, the right to relief in this action died with the 1948 Act; and judgment herein became and is unenforceable by reason thereof.*

This point is raised in paragraph 5 of the points on which appellant intends to rely. [Tr. p. 50.] See Point III of this brief.

(4) *The right to enforce, by an action in equity, the Emergency Price Control Act of 1942 as amended, expired on June 30, 1947, and it was not saved by the saving clause in Section 901(b) of that Act. (U. S. C. (a) Title 50, Sec. 901, as amended.)*

This point is raised in paragraph 10 of the points on which appellant intends to rely, appearing in the Transcript page 52. See Point IV of this brief.

(5) *The complaint fails to state a cause of action because of the uncertainty as to the act or acts relied upon, the pleading being that the first cause of action was based on the 1942 Act "and/or" Section 206 of the Housing and Rent Act of 1947.*

This point is raised in paragraph 8 of the points on which appellant intends to rely, appearing in the Transcript page 51. See Point V of this brief.

(6) *This action for the incidental relief of restitution [Complaint Count I, Tr. pp. 2-5], is barred by the one-year Statute of Limitations.*

This point is raised in paragraph 7 of the points on which appellant intends to rely. [Tr. p. 51.] See Point VI of this brief. It was urged on the Motion to Dismiss. [Tr. p. 38, par. IV.]

(7) *No equitable jurisdiction for this action exists because the tenants had moved out at the time the action was filed. [Tr. p. 32.] The uncontradicted affidavit of appellant was the basis for this point in Motion to Dismiss. [Tr. p. 27, par. II.]*

This point is raised in paragraph 6 (Errors of Law), set forth in the points on which appellant intends to rely. [Tr. p. 51.]

In this connection, it does not appear that appellant as landlord re-rented these premises to new tenants or that she was receiving any rentals from anyone at the time this action was filed. Equitable jurisdiction as a basis for this incidental relief of restitution, did not, therefore, exist. See Point VII of this brief.

The motion to dismiss was first presented to District Judge Pierson M. Hall, and Judge Hall on March 3, 1949, on his own motion, set aside the submission of the motion for a new trial and the motion to dismiss and transferred the two matters to Judge Cavanah for hearing because he had tried the case in the District Court. [Tr. p. 55.] Thereafter, the two matters were heard together before Judge Cavanah and both motions denied. [Tr. pp. 55 and 56.]

POINT I.

The District Court Had No Jurisdiction of This Equitable Case, When Filed, Because at That Time There Was, and Still Is, Pending in the California State Court, Another Action by the Tenant White for Damages for Overcharges (Which Is the Main Subject Matter of This Action).

The facts relating to this point are set forth in the preliminary statement of the case herein.

Notwithstanding the fact that the complaint herein seeks equitable relief by injunction, it is obvious that restitution of the amount claimed as overcharges for rent is the main subject matter of this action. This appears from an examination of the complaint [Tr. pp. 2-7], that the first cause of action is for restitution of the claimed overcharges and the second cause of action is for an injunction to prevent violations of the Act, although the tenants, alleged to have paid the overcharges, had removed from the premises long prior to the filing of the injunction. [See Tr. p. 32.]

The restitution claimed for the tenant White was $797.50 and for Woodfaulk $127.00.

The law is clearly stated in federal cases cited below in this point.

The rule is that the Court first acquiring jurisdiction retains it. This rule is concisely stated as follows:

> "The general rule is that the authority of the court which first takes control of the subject matter of litigation continues until it has finally and completely dis-

posed of the matter, and no court of coordinate authority is at liberty to interfere with its action (citing many cases)."

Rosenberg v. Rosenberg, 85 F. 2d 349.

The rule is also well established that after jurisdiction has been assumed by one Court of coordinate jurisdiction, suit cannot be filed in another Court in regard to the same subject matter.

"After jurisdiction has been assumed by one court of coordinate jurisdiction, the parties to the suit may not thereafter be permitted to maintain a suit for the same relief in another court of coordinate jurisdiction. It would, of course, be highly illogical and result in diverse decisions to countenance such procedure."

Gregg v. Winchester (9th Cir.), 173 F. 2d 512 (Opinion by Stephens, C. J.).

To the same effect is:

Gillis v. Keystone Mutual Casualty Co. (6th Cir.), 172 F. 2d 826.

Another statement of the same principle is:

"Where the jurisdiction of the State court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res to defeat or impair* the state court's jurisdiction."

First National Bank & Trust Co. v. Skokie (7th Cir.), 173 Fed. Rep. 1, 4, citing,

Kline v. Burke Construction Co. 260 U. S. 226, 229, 67 L. Ed. 226.

POINT II.

Objection to Lack of Jurisdiction Is Not Waived by Failure to Include Such Defense in the Answer.

Point I of this brief was one of the points [Point I, Tr. p. 27] raised and presented on the Motion to Dismiss this action in the District Court.

Although this point was not raised in the answer in this case, nor presented at the trial, it was urged on the motion to dismiss, argued at the same time as the action for a new trial.

This point of jurisdiction is available to the defendant at any time and it was not waived by a failure to present, prior to the time of the filing and arguing of the motion to dismiss.

This point has been decided in a federal case wherein the Court said:

> "The defense of lack of jurisdiction of the subject matter is not waived by failure to include such defense in the answer; but the defense may be raised by motion to dismiss after answer."
>
> *Union Nat'l. Bank et al. v. McDonald,* 36 Fed. Sup. 46, citing,
>
> Federal Rules of Civil Procedure for District Court, 12(b), 28 U. S. C. A. following Section 723(c).

POINT III.

The Court Had No Jurisdiction to Grant the Expediter Any Relief Because the 1942, 1947 and 1948 Acts All Expired by Their Terms on or Prior to April 1, 1949; and All Rights to Recover on Overcharges Expired Therewith.

The general rule in support of this point has been briefly stated, as follows:

> "When an Act has thus expired . . . in the absence of a savings clause, all suits must stop where the repeal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."
>
> *Mo. Pacific R. Co. v. U. S.,* 16 Fed. Sup. 752, 760, citing,
>
> *S. C. v. Gaillard,* 101 U. S. 433, 438, 25 L. Ed. 937.

There is no savings clause in the 1947 and 1948 Housing and Rent Acts which can serve to preserve this cause of action after their expiration.

The Savings Clause in the 1942 Emergency Price Control Act (U. S. C. A. Tit. 50, Sec. 901b) following the statement that the Act should terminate on June 30, 1945, reads as follows:

> "Except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act, and such Regulations . . ., shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense."

This Savings Clause does not apply to an action in equity to enforce the provisions of this Act; and any equitable suit for injunction or enforcement by way of restitution, because such action is not within the meaning of such Savings Clause.

This point is definitely decided, in principle, in the following case:

Talbot v. Woods, 164 Fed. Sup. 2d 493.

It is also decided in a case directly in point on this subject:

Woods v. Gochnour, 81 Fed. Sup. 457 (quoted from at length in Point VI of this brief).

POINT IV.

The District Court Had No Jurisdiction of This Act Filed July 23, 1948, Because the 1942 Act, as Amended, Had Expired by Its Terms Prior Thereto.

The arguments and authorities cited in Point III apply equally to this point especially the principles decided in the case of:

Woods v. Gochnour, 81 Fed. Sup. 457,

quoted in Point VI on the subject of the Statute of Limitations are applicable to this point and show that the District Court should have granted the appellant's motion to dismiss this action on the ground of jurisdiction.

POINT V.

The Complaint Fails to State a Cause of Action, in That It Fails to Show With Certainty Upon Which Federal Act It Was Founded.

The complaint, in the form in which it is worded, fails to state a cause of action.

Paragraph II of the First Cause of Action, reads:

> "Jurisdiction of this cause of action is conferred upon this Court by Sections 205(c) of the Emergency Price Control Act of 1942, as amended, and/or Section 206 of the Housing and Rent Act of 1947, as amended." [Tr. p. 3.]

The same "and/or" character is contained in paragraph II of the Second Cause of Action leaving it uncertain whether the plaintiff is proceeding under a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended, or Section 206(a) of the Housing and Rent Act of 1947, as amended. [Tr. p. 5.]

Again, in the same paragraph, it is uncertain whether the violation is of Section 2(b) of the Emergency Price Control Act of 1942, or the Controlled Housing Rent Regulations in the 1947 Act. [Tr. pp. 5 and 6.]

These statutes are to enforce penalties for overcharges of rent.

There is no way for the Court or defendant to determine whether the Expediter intends to plead a violation of one statute or another. This is because of the use of the phrase "and/or."

In a discussion, in the California Supreme Court, in the case of

In re Bell, 19 Cal. 2d 488, 122 P. 2d 22,

it is shown that such pleading has been condemned by many courts and is open to objection.

In that case the California Supreme Court said:

> "The expression 'and/or,' which made possible a conviction couched in such general terms, has met with widespread condemnation. (Citing many cases from various statutes.)
>
> "It is true that the expression has proved convenient in contracts and other instruments where, by its intentional equivocation, it can anticipate alternative possibilities without the cumbersome itemization of each one. (118 A. L. R. 1367; 43 Yale L. J. 918, 20 Marquette L. Rev. 101.). It lends itself, however, as much to ambiguity as to brevity. Thus it cannot intelligibly be used to fix the occurrence of past events. . . .
>
> "A comparable lack of precision was censured by the United States Supreme Court in Stromberg v. California, 283 U. S. 359, 368 (51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484). . . .
>
> "It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld. . . .
>
> "The ambiguity of the judgment in the present case would thus clearly warrant a reversal of the conviction on appeal or other direct attack."

Under the principle of the foregoing authorities, this judgment should be reversed for the reason that the complaint fails to state a cause of action.

POINT VI.

This Action Was Barred by the One-Year Statute of Limitations.

The facts relative to the Statute of Limitations in this case are as follows:

The action was filed on July 23, 1948. [Tr. p. 8.]

The overcharge for which damages or restitution is sought were alleged to have been collected prior to the expiration of the 1942 Act, on June 30, 1947, except for the period July 1, 1947, up to and including September 13, 1947, on the smaller claim, or a period of eleven weeks which at $4.50 per week in the Woodfaulk claim would entitle the Expediter to $49.50 on that behalf.

Applying the one-year Statute of Limitations to this action, the alleged claims for overcharges collected prior to July 23, 1947, would be barred.

On this basis, all of the alleged overcharges on the White tenancy accrued prior to April 22, 1947, and the whole of this claim would be barred.

On this basis the greater part of the Woodfaulk claim, that is, all except seven weeks at of $4.50 per week, or $31.50 on this claim would be barred.

The Law.

There is no question but what the whole of the White claim for overcharges and all but a few weeks of the Woodfaulk claim were barred in any action under the statute for treble damages. This point is decided in

Sampson v. Thomas, 76 Fed. Supp. 691, 693, 694.

Under the principles set forth in the following case, the equitable action, having as an incident thereto, restitution of overcharges, was also barred.

Woods v. Goochnour, 81 Fed. Supp. 457.

This is a decision of the District Court, but we find no appeal therefrom and we rely upon the principles therein stated.

That action was filed, as was the present case, in July, 1948. All overcharges claimed were collected prior to the termination of the 1942 Act on which it was based *June 30, 1947.*

The Court pointed out that the complaint was filed July 12, 1948, for overcharges between the periods April 1, 1947, and June 30, 1947. That it was an equitable action in which plaintiff sought to sustain the jurisdiction on the ground that the Court had jurisdiction in the equity action to also grant the *additional relief of restitution of overcharges,* relying upon two cases cited and relied upon the expediter in this case, namely, *Porter v. Warner Holding Co.,* 328 U. S. 395.

Creedon v. Randolph, 165 F. 2d 918.

The expediter there relied upon the savings clause in the 1942 Act (50 U. S. C. A. Appendix, Section 901(b)). The plaintiff claimed he was suing under Section 205(a) (as in the present case) and not under Section 205(e), which the expediter there admitted was barred.

The Court said:

> "The crucial question, in the present case however is whether there is any basis for the exercise of equitable jurisdiction at all under Section 205(a) in an action brought after the termination of the Act." (June 30, 1947.)

The Court, on this point held:

> "In each of the cited cases the action was commenced and disposed of in the Trial Court before the termination of the Price Controlling Act. In the instant case, however, the Act had expired before the complaint was filed. The savings clause, which authorizes any proper suit to enforce rights or liabilities incurred prior to termination, could not then cover suits in equity, Sec. 205(a), either to enjoin future violations of the Act or to enforce compliance with the Act for the obvious reason that the Act had ceased to exist. Since equitable jurisdiction to enter an injunction decree or compliance order had died with the Act, the incidental and dependent power to order restitution, likewise, had expired."

The plaintiff argues that Congress had power to order restitution of rental overcharge under the old Act of 1942 in the enforcement of the new one of 1947. The Court held this error, saying:

> "The Housing and Rent Act, is not in any sense an extension or continuation of the Price Control Act, but a wholly new and independent Statute. It is narrower in scope, does not have the same sanctions for enforcement, and differs in other respects, which I shall not detail here from the Price Control Act.
>
> "The powers of this court to order restitution of overcharges under an expired Statute cannot be derived from the desirability of aiding in the enforcement of some other and different Statute.

"I find no justification for such an extraordinary extension of the equity powers of the court in the provisions of either the old or the new Act.

"The motion to dismiss the first cause of action of plaintiff's complaint will be granted."

This question of the Statute of Limitations was affected by the fact that the purported retroactive Order made by the Expediter on June 30, 1947, attempted to have it take effect back on June 5, 1944, was void. If held void by this Court, then the White claim for restitution and all but a few weeks of the other claim fails.

Plaintiff's Exhibit 2A, the Registration Certificate, was transmitted to this Court as a part of the record on appeal, as is also the enlargement thereof under paragraph 17 of the designation of papers, and records on appeal [Tr. p. 56], showing that appellant, the landlord, filed said registration certificate on June 4, 1947; that it was received for editing on June 5, 1947, and was reviewed on June 9, 1947, and entered in the Examination Department on June 19, 1947.

Plaintiff's Exhibit 2A also shows that there was a purported order dated June 30, 1947, attempting to become effective retroactively, from June 5, 1944, changing the rental from $15.50 per week to $10.00 per week. This registration certificate, plaintiff's Exhibit 2A and the enlargement shows clearly on its face that there was a change by someone from the figure Section 3, paragraph 3, of $7.50 to $15.50. An attempted overcharge can be

recovered upon only upon the basis of this alleged retroactive order which would make the overpayment $5.50 per week. [Tr. p. 8.]

Uncontradicted facts in this case are set forth in the affidavit of appellant filed with the Motion to Dismiss that upon receipt of a notice to register the housing accommodations she went, within a very short time after June 4, 1947, to the Office of Price Administration and registered the White tenancy at $7.50 per week and the Woodfaulk tenancy at $4.50 per week. [Tr. p. 33.] Said uncontradicted affidavit further shows that subsequent to June 4, 1947, appellant never received either personal service or service by registered mail or otherwise, from the Office of Price Administration of a notice of an intended change in the amount of her registration of the maximum amount of rent payable on the White unit and that she had no knowledge of the change from $7.50 per week to $15.50, or from $15.50 to $10.00 per week. There is no evidence in the case nor is there any in this record that any such notice of intended change in the maximum amount of rent was ever served upon appellant or sent to her by registered mail. Attorney Edgar E. Menzlaff, who tried this action in the District Court, states in his uncontradicted affidavit that no testimony was ever introduced at the trial of this action that there was any service upon appellant by the Office of Price Administration, by registered mail or otherwise, of a notice of any intended change in the amount of the maximum rental under such registration. [Tr. pp. 40-41.]

THE LAW RELATIVE TO THE RETROACTIVE ORDER.

The purported retroactive order appears on the back of Plaintiff's Exhibit 2A changing the alleged legal rent from $15.50 to $10.00 effective from June 5, 1944, was void because there was no notice given as provided by Section 1300.207 from document 59148 known as Procedural Regulations "3" from which we quote as follows:

> "Action by rent director on his own initiative. In any case where the rent director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter the order on his own initiative, he shall before taking such action serve a notice upon the landlord of the housing accommodation involved stating the proposed action and the grounds therefor. This proceeding shall be deemed commencing on the date of issuance of such notice."

And there was no compliance with the provisions of Sec. 1300.362 relative to service of papers, reading as follows:

> "*Service of papers.* Notices, orders and other process and papers may be served personally or by leaving a copy thereof at the residence or principal place of business of the person to be served, or by mail, or by telegraph. When service is by registered mail or telegraph the return post office receipt or telegraph receipt shall be proof of service. When service is by unregistered mail an affidavit of service that the document has been mailed shall be proof of service."

The effect of invalidity of this purported retroactive order is that in the absence of a valid order for a retroactive change in the maximum amount of rent, the one year statute applies from the time of the actual violation and cannot be held affected by any other rule.

POINT VII.

There Was No Equitable Ground for This Action, Because Both Tenants Had Moved Out of the Property Before This Action Was Filed; and, Therefore, No Basis for the Incidental Relief of Damages for Overcharges.

There were two defendants, as shown by the table to the complaint. [Tr. p. 8.] Mrs. Harold White was sued for the larger amount of overcharge, and, as to her the complaint charged overcharges up to April 22, 1947. [Tr. p. 8.]

According to appellant's affidavit, Mrs. Harold White vacated the premises April 21, 1947, and she did not occupy the same thereafter. [Tr. p. 32.]

It was charged in the complaint that Mrs. Woodfaulk overpaid rental to and including September 13, 1947, and the Court found in accordance therewith. [Tr. p. 14.] Then, a short time thereafter, to-wit: On October 15, 1947, Mrs. Woodfaulk vacated the premises. [Tr. p. 32.] It further appeared that neither tenant was in this property at the time of the filing of this action on July 27, 1948. For this reason there was no equitable basis for the action of restraining appellant from continuing to collect overcharges from them or anyone else.

There was no showing in the complaint or in the evidence that the premises were rented again to any tenant. The complaint merely alleges a collection of excess rentals according to the schedule attached to the complaint and the latest date or any occupancy shown by any tenant was September 13, 1947.

The rule applied in other jurisdictions, and there is no reason why it should not be applied here, that this form of equitable action for injunctive relief does not lie in

favor of tenant who has moved out of the properties before the complaint is filed.

In the District Court it was held:

> "The plaintiffs, Leroy W. Paxton and Julia A. Paxton, who formerly occupied the premises 244 North Franklin Street, vacated those premises on September 23, 1947. Therefore, no party is presently before the court who has standing to seek injunctive relief with respect to those premises."
>
> *Paxton v. Smock,* 73 Fed. Supp. 793.

The principles involved in this point are discussed in the case of

> *Woods v. Kooker,* D. C. W. D. Ark (April, 1949), 83 Fed. Supp. 362, 364.

In discussing equitable relief of this kind the Court said:

> "The historic injunction process was designed to deter, not to punish (p. 364)."

In denying an injunction and any equitable relief under the facts there, the Court said:

> "The Defendant has long since sold the property involved and does not now own any property for which he receives rent. He is in no sense a professional landlord, and an injunction under these facts would accomplish no useful purpose."

No authorities are necessary on the point that an injunction should not and cannot be granted to restrain where there is nothing to restrain, and this fact shows that the only purpose of this suit was the restitution, for this was the first count in the complaint and the only thing really accomplished by the judgment.

For the foregoing reasons, it is respectfully submitted that the order denying the motion to dismiss should be reversed and the case dismissed, or if not dismissed, then a new trial should be granted.

Respectfully submitted,

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